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No. 87-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARGILL, INCORPORATED,
Petitioner,
v.
CHARTER INTERNATIONAL OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh District

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its petition here, Cargill noted the parallel issues now arising in appellate decisions interpreting § 363(m) and § 364(e) of the Bankruptcy Code, and cited *Unsecured Creditors' Comm. v. First Nat'l Bank & Trust Co. (In re Ellingsen Maclean Oil Co.)*, 834 F.2d 599 (6th Cir. 1987), *re'hg denied* (January 15, 1988). Pet. at 8, n.4. We are now advised that the Unsecured Creditors' Committee for Ellingsen McLean Oil Co. will file a petition for certiorari in that case in this Court on or about April 15, 1988. Cargill respectfully suggests that this Court consider both petitions simultaneously, grant certiorari in both cases and consolidate the two cases

for the purpose of argument. Such treatment would eliminate the conflicts and increasing confusion in decisions interpreting §§ 363(m) and 364(e) of the Bankruptcy Code.

Several points made in the Brief in Opposition require clarification and response.

I

Corrections of Factual Statements By the Respondent.

The respondent asserts that on January 17, 1986 the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division (the "bankruptcy court") "vacated" the part of its Scheduling Order that set January 14, 1986 as the final date for the submission of competitive offers to CIOC. No citation to the record accompanies this assertion because the bankruptcy court took no such action. The bankruptcy court simply ignored the Scheduling Order, which it had entered on December 27, 1985, and which incorporated the appropriate procedures under § 363(b) upon which Cargill relied. The bankruptcy court also ignored the fact that competitive offers were to be submitted to CIOC. Only CIOC could evaluate whether it was wise to enter into ongoing business relations with any competing offeror, particularly one which had declined to participate in the earlier orderly bidding procedures conducted for CIOC and had failed to submit evidence of its financial status as required of any competitive offeror in the Scheduling Order.

CIOC also has edited remarks of Cargill's counsel from the January 17, 1986 transcript in a misleading manner. CIOC Br. at 7. Because this transcript is not now before this Court, the context of that exchange is supplied here:

> Mr. Heiman: Your Honor, may I have just one more second of your time? Because we—again, I apologize, we did not understand the procedure today. We are not in a position to respond to that

bid, because we understood the procedure to be that competitive bidding would be closed on January 14—

The Court: Well, I don't know where you got that idea, because anyone who comes in this courtroom knows that the Court deals with these matters at a public hearing and lets it go to the highest and best bidder.

Mr. Heiman: Well, we have been dealing with the Debtor and its counsel for months now, Your Honor, and that's basically how we were led to believe that this hearing would be conducted, and no competitive bids were submitted in writing as required by the order.

January 17, 1986 hearing transcript, R.3-25, 26.

II

Interpretations of § 363(m) in the Seventh, Ninth and Eleventh Circuits Are Inconsistent and Demonstrate the Need for this Court to Focus on the Purpose of § 363(m) and Its Practical Application.

None of the cases cited by the respondent in support of the decision below involved an actual good faith purchaser seeking correction of a bankruptcy court's plainly improper auction. The "uniformity" which CIOC reads into these cases is nonexistent. *In re Sax*, 796 F.2d 994 (7th Cir. 1986), plainly leaves open for future determination and possible appeal the allocation of the proceeds of the disputed property. Because Cargill seeks recognition of its right to the Excess Purchase Price, the relief sought by Cargill is not inconsistent with *Sax*. *Sax* did not question or overrule *In re Chung King, Inc.*, 753 F.2d 543 (7th Cir. 1985), in which the successful purchaser was granted precisely the relief sought by Cargill.[1] A court which is bound by the precedent of

[1] The respondent's statement that *Chung King* was an appeal from an order vacating a confirmed sale demonstrates its unwillingness to recognize the fundamental changes in sales of bankruptcy estate assets under the Bankruptcy Code. Under the Code, there is no provision for orders confirming sales when no competitive offer

Sax has noted, "The policies underlying section 363(m) are *practicality* and finality." *Weinstein v. Greer (In re Pentell)*, 1987 U.S. Dist. Lexis 8610 (N.D.Ill. 1987) (emphasis added). It is not practical to require a good faith purchaser who responds to an improper, *sua sponte*, auction by the bankruptcy court to stay the sale to itself in order to preserve its contractual rights. *Sax* does not support this feckless requirement.

Similarly, *In re Abbotts Dairies*, 788 F.2d 143 (3rd Cir. 1986), which allowed relief to a creditor appealing an unstayed, executed transfer, citing, *inter alia*, *Mills v. Green*, 159 U.S. 651 (1895), is not compelling authority supporting the decision below. See 788 F.2d at 150, n.6. Finally, the convoluted facts in *In re Exennium*, 715 F.2d 1401 (9th Cir. 1983), did not involve an unauthorized bankruptcy court auction nor an appeal by a good faith purchaser forced to participate in such an auction in order to preserve its rights. The respondent ignores the more recent Ninth Circuit discussion of § 363(m) in *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985): "The rule that failure to obtain a stay pending appeal renders the issue moot did not originate with the Bankruptcy Rules. Rather it is a judicial doctrine which developed from the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot." Pet. 7.

The apparent internal inconsistency evident in the decisions of the Seventh and Ninth Circuits is also present in the decisions of the court below. See *Markstein v. Massey Assocs, Ltd.*, 763 F.2d 1325 (11th Cir. 1985). The inconsistencies in the interpretation of § 363(m) in the Seventh, Ninth and Eleventh Circuits demonstrate the need for this Court to give guidance on the central

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was submitted. *See, generally*, Novellino, *After Notice and Hearing*, 55 Am. Bankr. L.J. 293 (1981). The facts in *Chung King* parallel the facts in this case more closely than any other reported decision.

issue of whether § 363(m) overruled *Mills v. Green*, 159 U.S. 651 (1895), and *Bank of Marin v. England*, 385 U.S. 99 (1966).

Cargill is not "asking this Court to create an exception to § 363(m) which would allow a purchaser to appeal an order authorizing a sale without obtaining a stay." Br. in Opp. 6. On the contrary, Cargill is asking this Court to restore rationality and long standing precedent to the interpretation of § 363(m), a provision intended to protect good faith purchasers, rather than to deprive them of effective appellate relief when bankruptcy courts fail to observe the limitations on their role under the provisions of the Bankruptcy Code.

III

Cargill's Assertion of an Administrative Claim and Pursuit of Its Appeal Are the Appropriate Procedures to Obtain Relief from the Bankruptcy Court's Mishandling of the Sale of the NPC Assets.

The respondent's reference to the "practical necessities involved in a successful reorganization," and the suggestion that the consummation of its plan of reorganization supports the decision below, are disingenuous. Typically in large reorganization cases, administration of disputed claims continues for a significant time after confirmation and consummation. Particularly when the reorganized debtor had committed in its plan of reorganization to pay administrative claims as they mature or are allowed—as CIOC did in its plan of reorganization—there is no negative impact on other creditors.

IV

The Provision for an Approval Order in the Contract Did not Provide an Appropriate Basis for the Bankruptcy Court to Hold the January 17 Hearing When No Objections to the CIOC Motion Had Been Filed and No Timely Offers Submitted.

The NPC-Cargill Contract contained a condition precedent that the Court "shall have entered an Approval

Order . . . with respect to this Agreement." Section 8.5 of the Contract, R1-3-1, Exhibit C. However, the Contract did not specify the form of the "Approval Order." Assuming that no party in interest objected to the proposed sale, the Bankruptcy Code does not authorize the entry of a bankruptcy court order addressing the actions of a debtor in possession taken pursuant to 11 U.S.C. § 363(b). The respondent argues that the bankruptcy court could enter an order if the terms of the sale agreement required such an order. The parties cannot by their contract create jurisdiction in the bankruptcy court to render an advisory opinion. *In re Robert L. Hallamore Corp.*, 40 Bankr. 181 (Bankr. D. Mass 1984), and *In re Murchison*, 54 Bankr. 721 (Bankr. N.D. Tex. 1985).

The Bankruptcy Court for the Middle District of Florida recognizes this in its local rules, though not in its actions. The current Local Rules of Bankruptcy for the Middle District of Florida, the Court whose acts are the subject of Cargill's petition, state clearly the method to be used to establish that all appropriate bankruptcy procedures have been followed when no interested party objects to a § 363(b) motion. Local Rule 205(b) and (c) states:

> (b) No Court Order shall be entered approving the terms and conditions of any sale. However, in the event that a timely objection is filed, the Court shall hold a hearing at which time it will overrule or sustain the objection to the sale as may be appropriate.
>
> (c) The requirement of a "notice and hearing" contained in Bankruptcy Code § 363(b) shall have been satisfied if no request for hearing has been made after service of notice as provided for above or. if such objection has been filed, an appropriate Court order has been entered. Evidence that this has been done shall be sufficient in the form of a certified copy of the notice of sale as filed with the

> Bankruptcy Court and served on creditors, together with a certified copy of the Bankruptcy Court's docket sheet reflecting that no objection to sale or request for hearing had been made pursuant to the notice or, if such hearing was held, a certified copy of any Court order entered after request for hearing.

Local Rules, United States Bankruptcy Court, Middle District of Florida, Rule 205(b) and (c), p. 2-5 (effective Date: January 1, 1987).[2] The provisions in Sections 7.6 and 8.5 of the Contract requiring an "Approval Order" were capable of being met on January 15, 1986 by compiling the documents identified in Local Rule 205(c).

CONCLUSION

Nearly ten years after the passage of the Bankruptcy Code, many bankruptcy courts are still unaware that under § 363(b), the bankruptcy court has no role if parties in interest raise no objection. The overly broad interpretation of § 363(m) exacerbates the problem because substantive appellate review of cases such as the decision below is being denied by sometimes overbroad application of § 363(m). This case and the petition for certiorari by the Unsecured Creditors' Committee of Ellingsen MacLean Oil Co. provide this Court the opportunity to give needed clarification of the appellate rights of parties effected by transactions under §§ 363 and 364, two of the most central provisions of the Bankruptcy Code.

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[2] The fact that Local Rule 205 had not been adopted in January 1986 is not relevant because that rule simply clarifies the appropriate interpretation and implementation of § 363(b) of the Bankruptcy Code.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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